

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

WP(C).No. 22077 of 2007(C)

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PETITIONER:

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PVS MEMORIAL HOSPITAL LTD.,  
KALOOR, KOCHI-17, REP. BY ITS  
EXECUTIVE DIRECTOR.

BY ADV. SRI.P.R.RAMACHANDRA MENON

RESPONDENTS:

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- 1.STATE OF KERALA, REPRESENTED BY  
THE SECRETARY TO THE LOCAL SELF GOVT.(M)DEPARTMENT  
GOVT.SECRETARIAT, THIRUVANANTHAPURAM.
- 2.THE CHIEF TOWN PLANNER,  
GOVT. OF KERALA, THIRUVANANTHAPURAM.
- 3.THE REGIONAL TOWN PLANNER,  
REGIONAL TOWN PLANNING OFFICE,  
ERNAKULAM.
- 4.CORPORATION OF KOCHI,  
REP. BY ITS SECRETARY,  
PARK AVENUE, BOAT JETTY, KOCHI-11.
- 5.THE TOWN PLANNING OFFICER,  
CORPORATION OF KOCHI,  
PARK AVENUE, BOAT JETTY, KOCHI-11.

R1 TO R3 BY GOVT. PLEADER MR.K.J.MOHAMMED ANZAR  
R4-R5 BY ADV.MR.S.RAMESH BABU, S.C.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION  
ON 10/09/2007, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**PIUS C. KURIAKOSE,J.**

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W.P.(C)No.22077 of 2007  
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Dated: 10<sup>th</sup> September, 2007

**JUDGMENT**

The petitioner is a Hospital functioning very near to the Cochin Corporation's Private Bus-stand at Kaloore and their grievance is that the respondents, namely, the Corporation of Cochin and the Town Planning Officer, Corporation of Kochi (respondents 4 and 5) and the Chief Town Planner, Government of Kerala and the Regional Town Planner, Regional Town Planning Office, Ernakulam (respondents 2 and 3) are ignoring the specific directions in Ext.P12 judgment of this court in W.P.C.No.25478/06. The petitioner claims that their hospital ( the P.V.S.Memorial Hospital Ltd.) was established in the year 1992 with an array of super specialty and specialty care departments headed by committed medical/para medical staff equipped with such other infrastructure for providing excellent medical/patient care with high-tech facilities and sophisticated equipments operated by highly skilled personnel. The hospital maintains international functional standards and is dedicated to the task of raising the quality of life index. It is claimed that the hospital is committed to social and charitable activities, particularly related to the life and health of poor people. Lots of amounts are being spent offering free/concessional

treatment to the poor and needy people thus contributing to the social cause. Ext.P1 statement of details regarding the concessional/free treatment given by the hospital during the last five years is relied on in this context. The petitioner submits that for achieving the desired objectives, the hospital plan to expand the existing hospital complex by constructing additional structures having basement, ground floor and 14 floors in the property which has a total extent of 1.939 acres situated by the side of the main road at Kaloor. The application with plan for building permit was submitted on 1.12.2003 and Ext.P2 receipt is relied on in this context. The petitioner complains that alleging violation of the floor area ratio, the petitioner's application was rejected by the 4<sup>th</sup> respondent-Corporation simultaneously requesting the petitioner to obtain clearance from the Government. Thereafter the Government considered the facts and figures in the light of the report of the Chief Town Planner and other authorities and passed an order on 14.3.2005 exempting the construction of basement + ground + 14 floors commercial cum hospital building by the petitioner from the zoning regulations of the sanctioned Structure Plan for Central City, Kochi subject to six conditions. Ext.P3 is copy of the Government

Order. Condition No.(3) therein is that floor area ratio should be limited to 2. The petitioner submits that the 4<sup>th</sup> respondent-Corporation itself is competent and authorised to provide maximum permissible FAR of 3 on payment of additional fees prescribed under Table 2 of Rule 32(2) of the K.M.B.R., 1999 and Ext.P3 order to the extent it insists that FAR should be 2 only is a mistake. For rectifying that mistake, Ext.P4 representation was submitted to the Government on 31.8.2005. But while Ext.P4 was pending, the 2<sup>nd</sup> respondent, the Chief Town Planner issued the lay out approval as per Ext.P5 proceedings in respect of portion of the building upto and inclusive of the 7<sup>th</sup> floor. Accordingly, the petitioner remitted Rs.89,884/- with the 4<sup>th</sup> respondent towards the building licence fee and Ext.P6 is the receipt. In further to this, a revised building permit was issued by the 4<sup>th</sup> respondent on 23.1.2006 for completing the construction upto and inclusive of 7<sup>th</sup> floor and Ext.P7 is copy of that revised building permit. As stipulated in Ext.P7, Fire NOC was obtained from the Fire and Rescue Services Headquarters, Trivandrum. Since no action was taken by the Government on Ext.P4, the petitioner submitted a reminder Ext.P8 on 28.6.2006. Even though respondents 4 and 5 were knowing the actual position and

were aware of their authority to grant the maximum FAR as prescribed by K.M.B.R.1999 on payments of additional/stipulated fee, they expressed helplessness in view of the adverse entry in Ext.P3. They took the obsolete stand that Ext.P3 had to be got corrected by the Government itself. Accordingly, ignoring the pendency of Exts.P4 and P8, the 4<sup>th</sup> respondent issued a provisional order to the petitioner under Sections 406(1) and 208(1) of the Kerala Municipality Act, 1984 directing the petitioner to demolish the alleged excess constructions. The petitioner submitted Ext.P9 explanation dated 6.7.2007. The petitioner points out that the restriction imposed by the Government regarding FAR was by referring to the Structure Plan of Kochi sanctioned and notified vide G.O.(MS)No.103/91/LAD dated 20.3.1991 made applicable to the areas of Corporation of Kochi and neighbouring Municipalities and Panchayats. The petitioner also points out that it was considering the developments which are being implemented through out the State that the Government formulated K.M.B.R., 1999 in supersession of the Kerala Buildings Rules, 1984 and that the Government under Ext.P10 clarified that the provisions in K.M.B.R.1999 will prevail over those in the structure plan, 1991. Ext.P1 Government Order of clarification is relied on in this context. It

is pointed out that pursuant to Ext.P10 many local authorities otherwise covered by structure plan, 1991 were sanctioning building permits for constructing buildings within the area of the respective local authorities reckoning the FAR as prescribed under the K.M.B.R.1999. The petitioner came to know on further enquiry that Ext.P10 Government Order had been cancelled by the Government by promulgating a fresh Government Order Ext.P11 (G.O.(Rt) No.2121/LSGD dated 28.8.2006). The petitioner submits that it was challenging Ext.P11 that W.P.C.No.25478/06 was filed before this court by some of the aggrieved parties including the Builders' Association of Kerala and that under Ext.P12 judgment passed in that Writ Petition, this court set aside Ext.P11 and directed the concerned local authorities to consider applications for building permit submitted till the crucial date, i.e., 28.8.2006 in accordance with the provisions of the K.M.B.R.1999 with regard to the FAR and simultaneously directing the Government to consider the matter afresh in respect of sustainability of the K.M.B.R. over the structure plan, 1991 as regards FAR. The petitioner also points out that Ext.P12 has attained finality and that this court in subsequent judgments such as Ext.P13 has directed the local authorities to consider permit

applications submitted by others in accordance with the dictum in Ext.P12 judgment. On the above averments, the petitioner raise various grounds and pray for the following reliefs:

(i) Issue a Writ of Certiorari or such other appropriate writ or order quashing Ext.P3 to the extent it restricts the FAR as 2 instead of 3 as permissible in the KMBR 1999 and

(ii) Issue a Writ of Mandamus or such other appropriate writ or order directing the 4<sup>th</sup> respondent to consider the application of the petitioner for building permit submitted much prior to the cut-off date of 28.8.2006 in tune with KMBR 1999 with regard to the FAR on the basis of Ext.P12 judgment and to finalise the same and grant the sanction forthwith.

2. A counter affidavit has been filed on behalf of the Government, the 1<sup>st</sup> respondent. The averment that Ext.P12 has not been appealed against is not disputed. But it is contended that the question whether the provisions relating to FAR and the Structure Plan is not the issue in the case on hand. FAR stipulated in Ext.P3 order cannot be treated in isolation but is to be read as one among many conditions for permitting a use which is not permissible use at the petitioner's site as per the sanctioned structure plan for the Kochi

city. It is contended that as per the sanctioned structure plan for the Central City of Kochi, the site falls within the area zoned for residential use (R 150) wherein the proposed construction is not a permissible use but a use 'permitted on appeal'. The site is located close to a busy junction in the Central City of Cochin and falls within the commercial use zone of the Sanctioned Detailed Town Planning Scheme of Kaloore area and in the residential zone (R 150 medium density) as per the structure plan for Central City, Kochi. Thus the proposal was in violation of the zoning regulations of the Town Planning Scheme. The proposal was to accommodate considerable considerable commercial activities and medical activities in one building to be located on the open space in the premises of the existing hospital. Therefore the parking and other requirements of the existing hospital had to be taken into account while considering the proposal for the new commercial/medical building. It was considering all these aspects that the Government issued Ext.P3 sanctioning exemption subject to several conditions relating to access, parking facilities, FAR, Fire Safety, Pollution Control and approval of layout. The condition regarding FAR was only one of the conditions and the same should be seen in the light of the above. Referring to Ext.P4, it

is submitted that the petitioner's request was for granting exemption for construction upto FAR of 3 or to authorise the Kochi Corporation to do the same and also to waive the condition of layout approval by the Chief Town Planner. The Government forwarded the same to the Chief Town Planner vide endorsement dated 8.9.2005. While Ext.P4 was scrutinised in the office of the Chief Town Planner, the High Court passed judgment in O.P.No.8740/97 holding that the Government has no power to issue individual exemption orders for town planning scheme. This was why the Government decided to keep Ext.P4 in abeyance. The Government has issued letter No.2011/E3/2003/LSGD dated 2.1.2006 dispensing with steps for accepting and processing individual applications for exemption from approved town planning schemes. The Government by further letter dated 17.5.2007 clarified that even in the case of exemption orders issued before the judgment of the High Court, layout approval and building permit could not be granted. The Government is yet to receive Ext.P8 reminder from the petitioner. The provisions in K.M.B.R.1999 are of a general nature whereas those in the town planning schemes are worked out with the specific objective of directing the development of the scheme area in a planned manner. The counter affidavit proceeds to deny all the

averments in the Writ Petition and reiterates the contention that the question whether KMBR prevails over the structure plan is not the factor considered while limiting the FAR to 2 in Ext.P3. Referring to Ext.P12 judgment, it is submitted that the Government is examining the matter and fresh orders in this regard will be issued shortly. The Government have already varied the zoning regulation for the structure plan vide G.O.(MS)No.143/07/LSGD dated 31.5.2007. The FAR stipulated as per Ext.P3 cannot be treated as a single issue but is to be read as one among many conditions for permitting a use which is not a permissible use at the petitioner's site as per the sanctioned structure plan of Kochi. The counter affidavit goes on to contend that the FAR stipulated in the exemption order is not a direct reflection of the FAR provided in the KMBR or the structure plan. Hence the cut-off date mentioned in view of Ext.P12 judgment cannot be applied in this case. The counter affidavit reiterates that Town Planning Schemes sanctioned and notified can be varied or revoked only by a subsequent scheme sanctioned and published in accordance with the provisions of the Act. Referring to Rule 30(1) of the Rules, it is pointed out that occupancy of the building is to be governed by the usage of the plot proposed for development or re-development in

accordance with the provisions contained in the Development Plan or Detailed Town Planning Scheme prepared for that area. As per the structure plan, the plot in question was not permitted to be used for commercial purpose. The proposal was only use "permitted on appeal" as per the structure plan. Therefore, the proposed construction could be permitted only with the conditions stipulated by the Government. FAR of 2 is only one among the conditions stipulated by the Government aimed at minimising the adverse impacts of the proposal to have a commercial-cum-hospital building in the premises of an existing hospital which is situated near a busy road junction in the heart of Kochi City.

3. Mr.P.R.Ramachandra Menon, counsel for the petitioner and Mr.K.J.Mohammed Anzar, learned Government Pleader addressed very strenuous arguments before me in support of the rival positions taken by their respective clients in this case. Sri.S.Ramesh Babu, Standing Counsel for the Kochi Corporation also addressed me.

4. Apart from placing very strong reliance on Ext.P12 judgment, Mr.Menon would place before me copy of the Structure Plan for Central City Kochi. My attention was drawn to clause 5.2 in Part-I, dealing with scope of the plan, clause 4.2 in Part-II wherein

assessment of the future need in the city is dealt with, clause 4.4 dealing with policies and programmes of housing for the future, clause 1.3 captioned "Planning Synthesis" in Part-III which is the Part dealing with perspective plan, Part-IV dealing with zoning and subdivision regulations, Table 4.4 therein which will show that health institutions with in-patient facilities of more than 10 beds, educational institutions offering courses other than general education, hotels included in residential category in NBC 1970, retail shops and business institutions are all "uses permitted on appeal to the competent authority". Mr.Menon also referred to clause 4.10 which provides that the planning parameters such as plot size, coverage, floor area ratio etc. recommended for the different use zones shown in the proposed land use plan of the Central City are tabulated in Appendix-VI and Appendix-VII. It is also provided therein that the planning parameters of land use zones are only for general guidance of area development and do not take the position of bylaws, rules or other restrictions applicable to such areas. General rules and byelaws in the Kerala Municipal Building Rules are applicable for municipal areas and urbanising panchayats. Such rules are also specifically specified in the DTP Schemes for the scheme areas use. Hence the

planning parameters for the different land use zones prescribed in the Structure Plan are intended to supplement the above and the same have to be read in conjunction with the regulations in the Building Rules and the DTP Scheme. Counsel drew my attention to the planning parameters in Appendix-VI of the structure plan and also to the permitted FAR used in planned Indian cities such as Chandigarh and other major cities such as Delhi, Ahmedabad and Hyderabad. Mr.Menon also placed before me Government Notification, G.O.(MS) No.143/07/LSGD dated 31.5.2007 whereby variations have been proposed in the structure plan.

5. Mr.K.J.Mohammed Anzar, learned Government Pleader would endeavour to distinguish between the facts obtaining in Ext.P12 judgment and the present facts. He would emphasise that deviating from the structure plan would amount to violating the judgment of the Division Bench in O.P.No.8740 of 1997. The learned Government Pleader however fairly conceded that Ext.P12 judgment has attained finality.

6. Taking me extensively through Ext.P12 judgment, Mr.P.R.Ramachandra Menon would submit that the issue involved in this case is squarely covered by that judgment since the application

for building permit was submitted by the petitioner-hospital long prior to the cut off date of 28.8.2006. The maximum FAR permissible as per KMBR 1999 on payment of additional fees is 3 and the petitioner-hospital being ready to pay additional fees, the Corporation should have permitted FAR of 3 as sought for by the petitioner. The FAR of 2 which alone is permitted by the Government under condition No.3 of Ext.P3 was erroneous and at any rate violative of the directions in Ext.P12 judgment. My attention was drawn by Mr.P.R.Ramachandra Menon to the Government Order G.O.(Ms)No.143/07/LSGD dated 31.5.2007 whereby the Structure Plan for Central City of Kochi has been varied by the Government following the statutory procedure.

7. Mr.K.J.Mohammed Anzar, learned Government Pleader would submit that it is not correct to say that FAR is the only issue which arises in this case and that FAR of 2 came to be mentioned in Ext.P3 order by a mistake. The condition regarding FAR cannot be considered in isolation. That condition and the other conditions in Ext.P3 order are aimed at minimising the adverse impact of the construction proposed by the petitioner-hospital which is situated very near to a busy road junction in Kochi like Kaloor. As per the varied structure plan, the proposal of the petitioner was not a

permitted use but instead was only use permitted on appeal to the competent authority. The competent authority while issuing Ext.P3 imposed certain conditions which were absolutely necessary and the condition regarding FAR was just one.

8. The Corporation of Kochi has not filed any counter affidavit and the Corporation's stand was that in view of Ext.P3, it was difficult for them to accede to the request of the petitioner.

9. I have considered the rival submissions made at the Bar in the light of the pleadings and the various documents which are placed on record. Though the learned Government Pleader may be right in his submission that the FAR is not the only issue involved in this case, I am of the view that the principal issue between the parties now is FAR itself. As for FAR, the issue is covered by Ext.P12. The 4<sup>th</sup> respondent-Corporation is quite competent to grant maximum FAR of 3 in respect of commercial-cum-hospital complex of the petitioner as mentioned in table 2 of Rule 31 of KMBR, 1999 and the petitioner is ready to pay additional fees as prescribed in KMBR 1999. In Ext.P12 judgment, it is after noticing the merit in the contentions of the petitioner in that case that the provisions relating to FAR in KMBR, 1999 should prevail over the Structure Plan notified by the

Government in 1991 for the Structural City, Kochi, that I directed the Corporation to grant approval to the plans submitted prior to the cut off date of 28.8.2006 (date of Ext.P11 G.O.) by which the Government cancelled its own Ext.P10 G.O. which had clarified that the provisions of KMBR, 1999 will prevail over the Structure Plan in respect of FAR.

10. Ext.P12 judgment has attained finality and it was conceded before me that the directions in Ext.P12 are being complied with. Under Ext.P3 order exempting the constructions proposed by the petitioner from the zoning regulations in the structure plan as it obtained then was obviously passed by the Government taking into account the ground reality that the construction site is no longer a residential area but is actually situated in close proximity to Kaloore junction by the side of Ernakulam-Aluva road (National Highway) and that it is surrounded by several high rise buildings, commercial as well as residential buildings such as the Kaloore bus stand, 26 storied Muthoot Tower Hotel Complex including gokulam park. Obviously, the Government has taken into account the circumstance that a hospital is already being run by the petitioner and the proposal was intended to increase the existing facilities so as to extent medical benefits to

the public. As per the variations brought into the structure plan by notification G.O.(Ms) No.143/07/LSGD dated 31.5.2007 the uses intended are uses permitted on appeal to competent authority and not uses absolutely prohibited. It is submitted on behalf of the petitioner that as for conditions regarding the FAR mentioned in Ext.P3 such as parking facilities, fire N.O.C., Pollution Control Board's consent, access from the main road, all those conditions will be duly complied with by the hospital. Quashment of Ext.P3 is sought for only to the extent it relates to the condition regarding FAR. Under the above circumstances, I do not find any reason as to why relief which had been given to the builders who had submitted applications for building permit prior to the date of Ext.P11 G.O. should not be granted to the petitioner-hospital which is an existing one having an array of super speciality and speciality care departments with high-tech facility and sophisticated equipments handled by highly skilled personnel. It is significant to note that the claims of the petitioner that they are offering free treatment to poor and needy people and thus contribute to the social cause has not been denied in the counter affidavit.

11. The result is that the Writ Petition will stand allowed. Ext.P3

to the extent it restricts FAR as 2 instead of 3 which is permissible in terms of KMBR 1999 is quashed and there will be a direction to the 4<sup>th</sup> respondent to consider the application of the petitioner for building permit which is submitted prior to 28.8.2006 in tune with KMBR, 1999 with regard to FAR taking into account Ext.P2 judgment of this court and finalise the same. Needful shall be done by the 4<sup>th</sup> respondent at their earliest and at any rate within one month of receiving copy of the judgment together with a copy of Ext.P12 judgment.

srd/tgl

**PIUS C.KURIAKOSE, JUDGE**



